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IN THE SUPREME COURT OF THE UNITED STATES

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner.

versus

R. E. ELLZEY,
Respondent.

Petition for Writ of Certiorari to the Honorable Supreme Court of the United States.

Your petitioner, The Kansas City Southern Railway Company, respectfully petitions this court to grant a writ of certiorari to the United States Circuit Court of Appeals, Fifth Circuit, and to remove therefrom to this court for review the record in the case there lately pending entitled R. E. Ellzey, plaintiff in error, vs. The Kansas City Southern Railway Company, defendant in error, being case No. 4555 on the docket of that court. A certified copy of the record therein is presented herewith.

Respondent R. E. Ellzey seeks in this action to recover damages against your petitioner in the sum of $60,000.00.

This action originated in the District Court of the United

States for the Western District of Louisiana, the jurisdiction of said court being based on a diversity of citizenship and not on the statutes of the United States awarding compensation to employes of interstate carriers. The trial of the cause resulted in a verdict for the defendant, on which judgment was entered on the 6th day of March, 1925. The case was taken by writ of error to the Circuit Court of Appeals for the Fifth Circuit, which court on the 24th day of March, 1926, reversed this judgment in favor of the defendant and remanded the record to the court below, with instructions to retry said case in accordance with the views therein expressed. On the 3rd day of April, 1926, your petitioner applied for a re-hearing or a new trial in said case, which application for a rehearing was refused by said Circuit Court of Appeals on April 20. 1926, and thereupon your petitioner requested that said mandate be stayed until it could apply for this writ of certiorari.

Your petitioner respectfully says that said Court of Appeals was in error in ordering judgment to be entered in favor of the respondent herein, and in reversing the judgment appealed from and in not affirming said judgment of the District Court of the United States for the Western District of Louisiana.

STATEMENT OF FACTS.

The facts from which arise the questions here presented are, briefly, as follows:

At the time the said R. E. Ellzey was injured, he was acting as a United States deputy marshall and was engaged as a guard to protect employes of the Railway Company during the general strike of railway shopmen in the summer of 1922. While so engaged, at Leesville, Louisiana, a station on the line of The Kansas City Southern Railway Company, he was assigned to guard a telegraph lineman employed by said railway company, who was ordered to locate and repair trouble in the telegraph line of said railway company south of Leesville and north of DeQuincy. At DeQuincy, Louisiana, said lineman and said R. E. Ellzey procured a railway motor car and proceeded north on the line of said railway and located the trouble at a point south of DeRidder, Louisiana. After the lineman had made the required repairs, he and the plaintiff proceeded north in the motor car, and after passing DeRidder the motor car left the track with the result that plaintiff was injured.

One of the grounds of negligence relied on by the said R. E. Ellzey in his said suit, was that the derailment was

caused by the lineman's negligently operating the motor car at a dangerously high rate of speed. One of the grounds of defense set up was that said R. E. Ellzey approximately contributed to his own injury in that he assumed the control and direction of the motor car and induced the lineman to operate it at an excessive and dangerous rate of speed. The District Court instructed the jury on the issues of negligence and contributory negligence, and, so this petitioner respectfully states, such instructions were full and correct. The said Circuit Court of Appeals ruled that the District Court had erred in instructing the jury on the issue of contributory negligence, that portion of the instruction upon which the ruling of the said Circuit Court of Appeals was based being as follows:

> "If you should find that in this case the plaintiff urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery or if he saw that the car was being negligently run, in such a manner as with the knowledge that he had before him at the time, a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without

protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury and would in law constitute contributory negligence."

The reason given by the said Circuit Court of Appeals for such ruling was as follows:

"Under the above set out instruction to the jury the plaintiff could not recover if he voluntarily remained on the car after he saw that it was being negligently run, and a person of ordinary care situated as he was would have realized that it was dangerous to remain on the car. Though the plaintiff was negligent in the respect stated, if, as evidence adduced indicated, the defendant's employee was aware of such negligence in time to have avoided the injury by the use of reasonable care, and he failed to use such care, that failure might be found to be the sole proximate cause to the injury, and plaintiff's negligence be deemed a remote cause. Chunn vs. City & Suburban Railway, 207 U. S. 302; 10 Corpus Juris, 1107. The plaintiff's right to recover was not barred if his negligence was only a remote cause of his injury, and Merchant's negligence was the sole proximate cause of it. The instruction in question was erroneous. Because of that error the judgment is reversed, and the cause is remanded for a new trial."

Your petitioner says that the District Court had fully and accurately instructed the jury on the issues of con-

tributory negligence and proximate cause as shown by the following parts of the charge of the Court. In its principal charge, the Court instructed the jury as follows:

> "It does not seem to be disputed much on one side or the other that the car was being operated at a very high rate of speed. That, I take it, is virtually admitted on both sides; but the question is, who is responsible for it? If the defendant's agent was responsible for it; if he had control of that car, and if the plaintiff in no wise urged or contributed to the fast running of that car, then the plaintiff would be entitled to recover, but if the plaintiff did urge the operation of that car at a fast rate of speed, or if he contributed to it in any way; or if, after seeing the danger, or knowing that the car was being operated at an excessive, wild rate of speed, he had reason to believe that an accident would happen and that he would be injured thereby, it was his duty at the first opportunity available to him, to refuse to continue in such dangerous situation, and thereby avoid the danger to himself. * * * * (pp. 247, 248 Transcript of Record in said Court of Appeals).
>
> "Again, you are instructed that the burden is upon the defendant to establish contributory negligence upon the part of the plaintiff. In other words, gentlemen, primarily, it is the duty of the plaintiff to prove negligence on the part of the defendant, but when the plaintiff has made his case, then the burden is shifted to the defendant to meet the case made by the plaintiff, and in

doing so, is entitled to urge what is termed contributory negligence—that is, that the plaintiff, notwithstanding the defendant's negligence, was guilty of carelessness himself, **which contributed directly or approximately to the injury.** That is what is meant by contributory negligence."

"In this connection you are further instructed that if the said plaintiff commanded, directed or encouraged the said Merchant to operate the said car at a dangerously high rate of speed, and that the said plaintiff knew that it was dangerous for the said car to be so operated at such high rate of speed, and if by reason of such command, direction or encouragement on the part of the plaintiff the said Merchant did operate the same at a high rate of speed, thereby causing the wreck and injury, then the plaintiff could not recover, as he would be guilty of contributory negligence.

"However, you are instructed that the plaintiff would not be guilty of contributory negligence **approximately causing the injury** by merely encouraging the said Merchant to operate the said car—I will have to elimniate that, Mr. Jones. That is getting too close upon my deciding the facts give that part of it. I think I have substantially covered the matter otherwise. In other words, gentlemen, the idea which counsel wishes to convey there, and on which I agree with him in principle, is that if the plaintiff should suggest that the car be operated at a faster rate than that at which it was being operated, which within itself did not constitute apparent negligence, then

the fact that he urged the faster speed, would not be negligence.

"In other words, he would have to encourage such rate of speed which within itself, to an ordinary, reasonable man who had knowledge that the plaintiff had in this case, of the conditions which the evidence shows that he had, that it would be dangerous to so operate the car. In other words, he must simply exercise reasonable common sense, and if he knowingly encouraged a high rate of speed, he should be bound to expect the consequence which would flow from the negligence in operating the car, but he would not be held to such condition, if the extent to which he urged the faster rate of speed did not reasonably, to a man in his situation, indicate that it would be dangerous.

"In this connection, you are instructed that the plaintiff has the right to assume that the said Merchant knew the speed at which the said car could be operated safely, but if the plaintiff knew that he was encouraging, commanding or directing the said Merchant to operate said car at such rate of speed that was not reasonably safe, plaintiff would be guilty of contributory negligence, and could not recover." (Pp. 250-252 Transcript of Record in said Court of Appeals.)

To the instructions of contributory negligence counsel for respondent made the following objections and the District Court made the following rulings, and further instructed the jury on the issue of contributory negligence:

"Mr. Jones: The fourth and fifth: The mere supposed passenger riding in dangerous places, which we don't think is material here, because the proof shows that he was a passenger on this car. I had a memorandum here with reference to common dangers from the interruption of contributory negligence, but I think that any criticism I would have on that is cured by other portions of Your Honor's charge. I think you made it very clear as a whole, but I think that in the special charge you instructed the jury that, with reference to contributory negligence, in substance, that if Ellzey encouraged the running of this car at a high rate of speed, he would be guilty of contributory negligence. The criticism and exception to that is that Ellzey must have either known that it was dangerous to run it at the rate of speed at which he was encouraging it to be run, or the danger must have been so open and apparent that a person of ordinary care, situated as he was, would have appreciated that it was dangerous to run it at a high rate of speed.

"The Court: I think I explained that point very fully.

"Mr. Lewis: Your Honor please, we requested that charge No. 20, which would cover the question of contributory negligence, in the event they should find that Merchant was acting within the scope of his employment in making the trip to Leesville.

"The Court: Well, I think that has already been substantially covered, but I don't see any objec-

tion to it. I charge you, gentlemen, if you find from the evidence that the plaintiff solicited or requested Merchant to run the handcar fast, or at an excessive rate of speed, and in compliance with such request Merchant did run it fast, or at an excessive rate of speed, then I charge you that the plaintiff was guilty of contributory negligence even if Merchant was guilty of negligence and even if Merchant was acting within the scope of his employment in thus transporting the plaintiff, because the plaintiff cannot now complain that the handcar was running at an excessive rate of speed if he by his own conduct or request induced Merchant to run the handcar at an excessive rate of speed. In other words, if he induced or requested Merchant, gentlemen, to run the car at a dangerous rate of speed, when it was apparent to any reasonable man in the same circumstances as plaintiff was, it would make no difference that Merchant was in the employ of the company and discharging his duties in the course of his employment, because the act of the plaintiff and the plaintiff's negligence would have contributed approximately to the injury, which would defeat his recovery.

"Mr. Jones: We understand your Honor's position, but we merely reserve an exception to that question, as a matter of law." (Pp. 261-262 Transcript of Record in said Court of Appeals.)

The jury then retired to consider of its verdict and later returning into open Court, the respondent and his counsel and your petitioners' counsel being present, the

jury asked for further instructions, and the following occurred:

"Foreman of Jury: We want to know what would constitute 'contributory negligence' on the part of the plaintiff.

"The Court: Well, I don't suppose that there is any objection by either side to further elucidating the question of law. Contributory negligence, gentlemen, such as will defeat recovery means conduct on the part of the plaintiff that **contributes approximately to the injury.** In other words, if, notwithstanding the negligence of the defendant, the plaintiff does something himself **which reasonably contributes to the injury, approximately,** then that is what is known as 'contributory negligence.' For instance, if a man—a railroad train was being operated without a proper lookout at a crossing, and a person with no regard for his own safety, carelessly walked upon the track in the face of an approaching train, and was struck, that would be, in law, contributory negligence; or in any case where the act of the plaintiff enters into approximately the circumstances which bring about the injury, then it is contributory negligence. In other words, if in this case, you find that there was negligence on the part of the defendant in failing to provide a safe conveyance, failing to operate the conveyance upon which the plaintiff was traveling, in a safe manner, through its agents, who, though found from the evidence, were acting within the scope of the employment but notwithstanding such

> negligence, the plaintiff himself participated in counseling, directing or encouraging in such negligence or careless act on the part of those who were so engaged, then you would have in law that which would amount to contributory negligence, and which would bar recovery. The burden of proving contributory negligence rests upon the defendant. It is a special defense specially pleaded, and must be supported by the evidence, by a fair preponderance just as the plaintiff must support the charges of negligence on the part of the defendant by a fair preponderance of evidence. (Our italics throughout.)
>
> "I believe that substantially covers the point upon which you desired instructions." (Pp. 265, 266 Transcript of Record in said Court of Appeals.)

Respondent's counsel made the following exception to the last foregoing instruction on contributory negligence, and the Court made the following objection, and there followed the following colloquy in reference thereto:

> "Mr. Jones: With reference to the instruction on contributory negligence, we call attention to the fact that conduct upon the part of the plaintiff that would operate as contributory negligence in law, approximately causing the injury, would have to be negligent conduct—that is, such conduct as a man of ordinary care and prudence could not have been guilty of under the same or similar circumstances, having the opportunity and information, etc., the plaintiff had at the

time. The idea being this: that if the plaintiff was a passenger, as we think he was, on the car, that conduct upon his part, to constitute contributory negligence must have been such that he knew endangered his safety; and to that extent we except to the new definition of contributory negligence, and request that Your Honor elucidate that a little more clearly. Just the mere fact that he might have done something that brought about the injury would not be sufficient.

"The Court: To state the matter a little more clearly, gentlemen, in order to constitute contributory negligence, the plaintiff must have done something actively, or omitted to have done something passively, which to a reasonable man placed in his situation would have appeared to be such as would have brought about his injury. In other words, it must be such an act as a reasonable man acting in the circumstances in which he was situated, must reasonably have known that it would contribute to the accident; that he could reasonably have expected such a result to flow from the course which he had pursued; or he must have omitted to do something which a reasonable man under the same circumstances, could have done in order to avoid the injury. In other words, coming more particularly to the case in hand; if you should find that in this case the plaintiff, urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery; or if he saw

that the car was being negligently run in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law, constitute contributory negligence. I think that covers it.

"Mr. Jones: There is no plea of an omission to check the speed of the car, if Your Honor please.

"Mr. Lewis: There is, Your Honor.

"Mr. Jones: Is there?

"Mr. Lewis: It is definitely set forth in the answer.

"The Court: I think it is covered by the pleadings. Gentlemen, that is about as definite as I think I can make it.

"Mr. Jones: I really think you caught my view about it, but we will reserve an exception. The Court has reasonably covered the plaintiff's position, except this:—

"Mr. Lewis: Your Honor, if counsel is going to make an extended argument, I don't think it is proper at this time.

"The Court: Gentlemen, I have covered the point sufficiently, and whatever right may be

sought in the matter can be protected by the proper bill.

"Mr. Jones: Yes, I am going to except to that portion of the charge." (Pp. 267-270, Transcript of Record in said Court of Appeals.)

Respondent's Sixteenth Assignment of Error is as follows:

"The Court erred in that portion of the additional charge given after the jury had returned into open Court, and asked for additional instruction as follows:

" 'If you should find that in this case the plaintiff urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery, or if he saw that the car was being negligently run, in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law constitute contributory negligence." (Pp. 308. 309 Transcript of Record in said Court of Appeals.)

Your petitioner further says that on application for rehearing, your petitioner pointed out to the Court of Appeals that the charge of the District Court, read as a whole, answered the objections made by the Court of Appeals to that part of the instruction which it ruled to be erroneous, but notwithstanding all of which said petition for rehearing or new trial was refused.

Errors in the Circuit Court of Appeals.

Your petitioner respectfully states that the judgment and decision of the United States Circuit Court of Appeals, Fifth Circuit, upon the questions involved hereinbefore referred to are erroneous and in conflict with the decisions of this Court and with decisions of other United States Circuit Courts of Appeal, in the following particulars, to-wit:

1. The ruling of said Court of Appeals injected an issue in said case not raised in the trial court, nor assigned as an error in said Circuit Court of Appeals (McDermott vs. Severe, 202 U. S. 600; Gila Valley etc. Co. vs. Lyon, 203 U. S. 465).

2. On a general exception to a portion of the charge to the jury of the trial court, after finding such general charge correct, the said Court of Appeals erroneously, so

we respectfully contend, found error therein because such general charge was not modified or explained, although no request for any modification thereof was made. (Cooper vs. Schlesinger, 111 U. S. 148; Holder vs. United States, 150 U. S. 91; Newport News vs. Pace, 158 U. S. 36; Norfolk Ry. Co. vs. Earnest, 229 U. S. 114; Guerini Stone Co. vs. Carlin Construction Co., 248 U. S. 334; Bassell vs. Hines, 269 Fed. 231; Hall vs. Wear, 92 U. S. 728; Texas etc. Co. vs. Volk, 151 U. S. 73; Texas etc. Co. vs. Cody, 166 U. S. 606; Isaacs vs. United States, 159 U. S. 487.

3. Said Court of Appeals refused to consider the charge to the jury as a whole, when, if the whole charge had been so considered, any ground of criticism would have been removed (Magniac vs. Thompson, 7 Pet. 348. 390; Spring Co. vs. Edgar, 99 U. S. 645; St. Louis etc. Co. vs. Jeffries, 276 Fed. 73, 78; Chicago etc. Co. vs. McDonough, 161 Fed. 657; Gila Valley etc. Co. vs. Lyon, 203 U. S. 465.

Your petitioner respectfully shows that the principle of law decided by the Circuit Court of Appeals is in conflict with the decisions of this Honorable Court, and with decisions of the courts of appeals of other circuits, and that said decision of said Circuit Court of Appeals, Fifth Circuit, should be corrected by this Honorable Court in order

that same may conform with settled jurisprudence as fixed and established from time to time by this Honorable Court, as all of which is fully set forth in a brief or argument in support hereof, which is attached hereto and filed herewith.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Honorable Court, directed to the said Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana, commanding the said Court to certify and send to this Court on a day to be designated a full and complete transcript of the record of proceedings of said Circuit Court of Appeals had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court as provided by law, and that said judgment of the said Circuit Court of Appeals be reversed by this Honorable Court and for such further relief as may seem proper, and for all of which your petitioner will ever pray.

WILKINSON, LEWIS & WILKINSON,

C. H. LEWIS,

W. S. WILKINSON,

Attorneys.

STATE OF LOUISIANA,
PARISH OF CADDO:

J. D. Wilkinson being duly sworn, says that he is of counsel for the Kansas City Southern Railway Company, the petitioner; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

.....

Sworn to and subscribed before me on this 4th day of May, 1926.

.....
Notary Public.

BRIEF OF PETITIONER IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

The petition for the writ of certiorari in this case clearly states the reasons why it should be granted and shows that the decision of the Circuit Court of Appeals for the Fifth Circuit in this matter was in defiance of and contrary to the well established jurisprudence of this Honorable Court.

The opinion, we think, undoubtedly shows that the Circuit Court of Appeals, as a basis for the reversal of the judgment in favor of the petitioner here, injected an issue in the case not raised in the trial court, nor assigned as error in the Court of Appeal and on a general assignment of error to a portion of the charge to the jury by the trial court, predicated error thereon because such general charge was not modified or explained when no request of any kind for such modification or change was made in addition thereto failed to consider the entire charge even when its attention was specifically directed thereto, showing that the modification or explanation which it found necessary was fully given and covered in other portions of the trial judge's charge to the jury.

The jurisprudence as established by this court, we think, fully establishes the doctrine.

1. That an issue not raised in the trial court nor assigned as error on the face of the record can not be considered by the Court of Appeals.

2. On a general assignment of error to a charge of the court to the jury any modification or explanation thereof must be requested in the trial court and the failure to request such modification or explanation bars any relief to the appellant as against such charge if in the main it was correct.

3. That in determining whether any specific portion of the charge is erroneous or not, it is the duty of the court to consider the whole charge to determine whether the modification or explanation was fully given in other portions of the charge.

Before showing just what occurred in the trial court, and the action of the Circuit Court of Appeals in the matter, we desire to briefly discuss the first question and the right of the Court of Appeals to inject an issue in the case not made in the trial court.

In the case of Board of Commissioners vs. Sutliff, 97

Fed. 270, the United States Circuit Court of Appeals of Colorado, said:

> "In an action at law the Circuit Court of Appeals is a court for the correction of errors of the trial court exclusively and questions which were not presented to or decided by that court are not open for review."

The same doctrine has been many times announced by this court and we shall not undertake to cite all of the cases in that respect.

In the case of Wassatch Mining Co. vs. Crescent Min. Co. 148 U. S. 293; 37 L. Ed. 454, this court said:

> "An objection to a decree that it was made in the complainant's favor on grounds not stated in his bill, can not be raised for the first time on appeal."

Again in the case of Canal etc. Railway Co. vs. Hart, 114 U. S. 654; 29 L. Ed. 226 and in the case of Morrill vs. Jones 106 U. S. 466, 27 L. Ed. 267, this court said:

> "A defense can not be made for the first time in the Appellate Court."

Again in the case of Retzer vs. Wood, 109 U. S. 185; 27 L. Ed. 900:

> "In the absence of a statutory rule to the contrary the defense of a statute of limitation, which

> is not raised either in pleading or on the trial or before judgment, can not be availed of."

Again in the case of United States vs. National City Bank of New York, 281 Fed. 754; the U. S. Circuit Court of Appeals of New York, said:

> "The Circuit Court of Appeals on writ of error in a civil case can review only erroneous rules made by the District Court on questions called to its attention and passed on by it."

A writ of error from this last decision was dismissed by this court. See the same case 263 U. S. 726.

These authorities, we think, fully establish the proposition that the Court of Appeals can not raise an issue in a case which was not presented to the trial court and which was not assigned as error in the Court of Appeals. And yet, we submit, under the record in this case, that the Circuit Court of Appeals injected the issue, on which it predicated its reversal, into the case when the same was not raised in the trial court and the same was not assigned as error in the court of appeals.

From the record it appears in the case that, after the jury had been charged in general, it returned unto the Court and requested additional instructions, asking the Court what would constitute contributory negligence on

the part of the plaintiff. (Rec. 265.)

The Court then proceeded to define what would constitute contributory negligence on the part of the plaintiff, and at page 266 the jury again inquired how many different verdicts it might bring in, and the Court instructed the jury in this regard.

Therefore, as reflected at page 267 of the record, counsel for the plaintiff in error stated:

> "With reference to the instruction on contributory negligence, we call attention to the fact that conduct upon the part of the plaintiff that would operate as contributory negligence in law, approxicausing the injury, would have to be negligent conduct—that is, such conduct as a man of ordinary care and prudence could not have been guilty of under the same or similar circumstances, having the opportunity and information, etc., the plaintiff had at the time. The idea being this: that if the plaintiff was a passenger, as we think he was, on the car, that conduct upon his part, to constitute contributory negligence must have been such that he knew endangered his safety; and to that extent we except to the new definition of contributory negligence, and request that your Honor elucidate that a little more clearly. Just the mere fact that he might have done something that brought about the injury would not be sufficient."

At page 268 the Court, in response to the question or re-

quest of counsel for the plaintiff, said:

"To state the matter a little more clearly, gentlemen, in order to constitute contributory negligence, the plaintiff must have done something actively, or omitted to have done something passively, which to a reasonable man placed in his situation would have appeared to be such as would have brought about his injury. In other words,

it must be such an act as a reasonable man acting in the circumstances in which he was situated, must reasonably have known that it would contribute to the accident; that he could reasonably have expected such a result to flow from the course which he had pursued; or he must have omitted to do something which a reasonable man, under the same circumstances, could have done in order to avoid the injury. In other words, coming more particularly to the case in hand; **if you should find that in this case the plaintiff urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery; or if he saw that the car was being negligently run in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would**

> **contribute to the injury, and would in law, constitute contributory negligence."**

Only part in boldface type is assigned as error. (See Assignment No. 16, Rec. 308.)

After having attempted to comply with the request of the plaintiff to elucidate the matter a little more clearly, the counsel for respondent suggested that there was no plea of an omission to check the speed of the car, and on being assured that there was such plea, the Court then stated that it thought it had covered the pleadings and that it was about as definite as he could make it. Thereupon, the following occurred:

> "Mr. Jones: I really think you caught my view about it, but we will reserve an exception. The Court has reasonably covered plaintiff's position except this—"

Thereupon, counsel for the petitioner interposed an objection and counsel for the respondent said nothing further.

A portion of the charge thus given is made the basis of respondent's sixteenth assignment of errors and a portion of the charge thus given is quoted by the Circuit Court of Appeals in its opinion, beginning at the seventh line from the bottom of the page 268.

It will be noted that the plaintiff then said to the Court:

> "I really think you caught my view about it, but we will reserve an exception. The Court has reasonably covered plaintiff's position, except this—"

But nowhere is it pointed out in the supposed exception in what way and to what extent the Court had not covered respondent's position. Certainly at no time did the respondent except to the failure of the Court to include in its charge to the jury the fact that the negligence of the employee of the petitioner might be found to be the sole proximate cause of the injury and plaintiff's negligence be deemed a remote cause.

Following this conversation between counsel and the Court, at page 270 of the record, the following appears:

> "The court: Gentlemen, I have covered the point sufficiently, and whatever right be sought in the matter can be protected by the proper bill."

> "Mr. Jones: Yes, I am going to except to that portion of the charge."

> "The Court: The plaintiff excepts to the instruction. All right, gentlemen, you may retire."

From this it will be clearly seen that the respondent in error made no exception to the charge in question, unless by a stretch of the imagination it can be said that he excepted to the whole charge.

His assignment of errors, cannot make errors where it is not supported by the record of the case, and the record does not support the sixteenth assignment of error, which is made only to a portion of the charge of the Court, at the time and place in question, and is so general in its terms as not to advise the lower Judge of any error in it. In other words, counsel then took the position that the charge so given by the Court was erroneous altogether.

We, therefore, insist that we are correct in the assertion that the Circuit Court of Appeals injected an issue in this case not raised in the trial court nor assigned as error in said Court of Appeals.

But it is equally clear that on this general assignment of errors to a portion of the charge of the trial court, that the Circuit Court of Appeals found the charge as given correct, but held there was error because this was not modified or explained so as to charge the jury with reference to proximate cause when there was no request for such modification or change.

The assignment of error No. 16 takes just a portion of the charge in question and declares that the respondent excepted to the Court's giving that portion of the charge to the jury, when the record shows that no such exception

was taken to that portion of the charge and when the record shows that the charge given by the Court contained other things and other matters not embraced in the assignment and to which no specific exception was taken. Besides, instead of pointing out to the Court some error in the charge as given, counsel for the respondent declared:

> "I really think you caught my view about it, but we will reserve an exception. The Court has reasonably covered plaintiff's position except this—"

But nowhere states the exception wherein the Court had not reasonably covered plaintiff's position.

We think it is as well settled as anything can be settled, both by the rules of the Circuit Court of Appeal and by the Supreme Court of the United States, that exceptions of such general character to the charge of the Judge are not permissible and will not sustain error predicated thereon.

Rule Ten of the Circuit Court of Appeals provides:

> "But the party excepting shall be required to state distinctly the matters of law in such charge to which he excepts; and those matters of law and those only shall be inserted in the bill of exception and allowed by the court."

Here the respondent did not state distinctly the matters

of law in the charge to which he excepted, and under the rules of the Court only such matters of law as had been clearly pointed out can be considered by it.

In Foster's Federal Practice, 6th. Edition, at Section 701, the rule of the Court is quoted and numerous authorities are cited sustaining the position which requires the plaintiff to set out specially and particularly each error asserted and intended to be urged. In as much as the point now under discussion was not raised in the lower Court, was not discussed in the brief of counsel for respondent, and as we remember it, was not discussed in the oral argument of the case, it is submitted that the Court was in error in reversing the judgment of the jury because of the failure to include in the charge in question a modification or alteration of it.

We think it is as well settled as anything can be that where a charge is given partly correct, or partly incorrect, that an exception to such charge must point out the incorrect part of it, and where a charge given is correct in itself, that any modification or change in it sought by a litigant must be specially requested and an exception must be specially leveled, not at the charge as given, but at the refusal to give the modification or change of it.

In 8 Enc. of Pl. & Pr. 262, the law, sustained by numerous authorities, is thus stated:

> "Exceptions to instructions should specifically point out the alleged errors."

Even if it be conceded that the respondent did take an exception to the charge of the Court, the exception did not specifically point out the alleged errors in the charge.

The same doctrine is announced in 3 C. J. page 845, where the law is thus stated:

> "And, of course, the objection must point out the particular instruction or instructions or part thereof, and a general objection to the instructions or to the charge as a whole is not applicable on appeal, where some of the instructions or parts of the charge are correct."

The Circuit Court of Appeals having found that the charge as given by the Court was correct, held that it was error because the charge was not modified, changed or altered, so as to tell the jury that if the defendant's employee was aware of the respondents negligence in time to have avoided the injury, and did not do so, it would be liable. No such modification was requested and no such charge was requested by the respondent in the trial Court.

We think that the doctrine is now too well settled to admit of any question that the Circuit Court of Appeals

is without right or jurisdiction to set aside the verdict of the jury because of the omission to give a certain charge to the jury by the lower court in the absence of a request for such charge.

In the case of Cooper vs. Schlesinger, 111 U. S. 148, 28 L. E. 382, the Supreme Court of the United States said:

> "A general exception to a charge is of no avail where the charge embraces several distinct propositions and anyone of them is correct."

Here the Circuit Court of Appeals found the charge correct as far as it went, because it has decided that the respondent was, or might have been, guilty of contributory negligence by urging the operation of the handcar at a dangerous rate of speed, and even if the respondent excepted to this charge he should have pointed out the additions or changes which should have been made in it.

Again in the case of Holder vs. United States 150 U. S. 91, 37 L. E. 1010, the Supreme Court of the United States again said:

> "A general exception to a charge which does not direct the attention of the Court to the particular portion of it to which objection is made, raises no question for review."

The statement by counsel for the respondent, as dis-

closed by the record, page 270, that he was going to except to that portion of the charge, did not point out to the lower Court any errors in the charge as given, and if any portion of the charge as given was correct cannot avail the plaintiff on appeal.

Again in the case of Newport News vs. Pace 158 U. S. 36, 39 L. E. 887, the Supreme Court of the United States said:

> "A general exception to the refusal of a series of instructions, will not be considered, if any one of the propositions be unsound."

The declaration by the Supreme Court in the cited case is but the converse of the proposition for which we contend, that where a charge is partially correct and partially incorrect, an exception to the charge which does not point out the incorrect portion of it cannot avail as a basis for an assignment of error in the Appellate Court.

In the case of Norfolk Railway Company vs. Earnest, 229 U. S. 114, 57 L. Ed. 1096, the Supreme Court of the United States again said:

> "Excepting generally to an entire instruction which embodies several propositions of law, to some of which no objection properly can be taken, does not entitle the exceptor to take advantage of

a mistake or error in some single or minor proposition therein."

Mr. Justice Van Devanter, in discussing the matter in this case, said:

> "Not improbably the mistake in the instruction was purely verbal, and would have been promptly corrected had attention been specially called to it, and possibly it was not prejudicial to the defendant. But, be that as it may, the record discloses that full opportunity for presenting objections was afforded, and that the one now pointed out was not made. We must, therefore, apply the rule that where an instruction embodies several propositions of law, to some of which no objection properly could be taken, a general exception to the entire instruction will not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition therein."

In the case of Guerini Stone Company vs. Carlin Construction Company, 248 U. S. 334, 63 L. Ed. 275, the Supreme Court of the United States again emphasized this view of the law and said that such a general objection "could not furnish a basis for reversing the judgment."

In the case of Bassell vs. Hines, 269 Fed. 231, the United States Circuit Court of Appeals of the Sixth Circuit said:

> "Error in a portion of a charge is not open on appeal if the attention of the trial court was not directed to that particular subject."

It certainly appears from the record here that the attention of the trial court was not directed to the law as outlined in the opinion of the Circuit Court of Appeals.

In the case of St. Louis Southwestern Railway Company vs. Graham 119 Am. St. R. 112; 83 Ark. 61, 102 S. W. 700, the exact question was presented, and the Court said:

> "It is not reversible error to give an instruction which is in general terms accurate, but which lacks an explanation fitted to the facts to make it entirely accurate in the case at bar, if the explanation is not requested and the attention of the Court is not called to evidence requiring it."

To the same effect see Taylor vs. Kelly, 31 Ala. 59, 68 Am. Dec. 150; Holland vs. Tenn. Coal Co. 91 Ala. 444, 12 L. R. A. 232; Booth vs, Ry. Co. 29 Am. R. 97.

Had respondent called the lower Court's attention to the explanation or modification in question, it doubtless would have been given. But he did nothing of the kind. He did not even specifically except to the portion of the charge as given, let alone suggest any explanation or modification or addition to it, and the Court, we submit, was without right or authority to consider the question.

In his assignment of error No. 16 he assigns the whole part of the charge as error, and does not claim the charge as given should have been changed or modified. He claim-

ed all of it was wrong. The Court found it correct, but says under the evidence the jury might have found that the accident was not the proximate cause of respondent's negligence and, therefore, the Court should have instructed it as to the last change to avoid it, where no request for such instruction was made to the trial Court. Even in the assignment of error no such error is hinted or suggested, and consequently the question was not discussed in the original hearing before the Circuit Court of Appeals.

The doctrine for which we contend is well stated in the case of McKee vs. Tourte lotte, 167 Mass. 69, 48 L. R.A. 542, when the court said:

> "A party fearing that an instruction will be taken by the jury in a broader sense than he deems consistent with the law must call the Court's attention to the language to render it subject to review."

Again in the case of Longan vs. Weltmer, 64 L. R. A. 969, the Supreme Court of Missouri said:

> "A party cannot complain of a general instruction on the measure of damages which is correct as far as it goes, unless he calls the Court's attention to the matter and requests a limitation of the general language used."

In the case of Hall vs. Wear, 92 U. S. 728, 23 L. Ed. 500,

the Supreme Court of the United States said:

> "When the instructions to the jury complained of, so far as given, were correct, if the defendants desired further instructions respecting the matter, it was their duty to ask it."

The Circuit Court of Appeals has found the instructions given were correct and it was the duty of plaintiff, if he desired further instructions, to request it.

In the case of T. & P. Ry. Co. vs. Volk, 151 U. S. 73, 38 L. Ed. 78, the Supreme Court said:

> "The omission of the Court to instruct the jury upon the subject of the plaintiff's contributory negligence is not open to exception, where the bill of exceptions does not show that the defendant requested any instruction upon that subject."

In the case of Texas, etc., Ry. Co. vs. Cody, 166 U. S. 606 41 L. Ed. 1132, the Supreme Court said:

> "Failure to request additional instructions if those given on the subject are correct, will prevent an objection to their insufficiency on appeal."

See also Isaacs vs. U. S. 159 U. S. 487, 40 L. Ed. 229; Richardson vs. State, 91 Tex. Crim. 318, 20 A. L. R. 1240; Graham vs. State, 98 Ohio St. 77, 18 A. L. R. 1272.

Numerous other authorities might be cited, but these suffice to demonstrate that the Circuit Court of Appeals was wrong when it reversed the judgment on an issue not

presented to the trial court, not assigned as error in that Court and not even suggested in the printed argument of counsel for the plaintiff in this case.

These authorities, we think, fully demonstrate that the decision of the Court has been rendered, based on an objection not urged in the trial Court, nor in that Court, in the printed or oral argument of counsel for the respondent, and even if it was erroneous, even if the Court should have charged the jury in respect to the matter pointed out in the Circuit Court's opinion, surely it was not obliged to do so in the absence of a request therefor.

In the case of McDermott vs. Sevier, 202 U. S. 600, 50 L. E. 1162, discussing an exception to the charge of the Court, this Court said:

> "The Court's attention was not called to any particular in which this charge, which covers a number of elements of damages, was alleged to be wrong; only a general exception was taken to the charge as given in this respect. It has been too frequently held to require the extended citation of cases, that an exception of this general character will not cover specific objections which, in fairness to the Court, ought to have been called to its attention, in order that, if necessary, it could correct or modify them."

The same doctrine was held in B. & P. Ry. Co. vs.

Mackey, 157 U. S. 39 L. Ed. 224, and we take it that the rule is well settled that plaintiff cannot just simply say that he excepts to a certain portion of a charge without pointing out wherein such charge is in error, and then rely on such a general exception for a reversal of the judgment against him.

We, therefore, insist that on a general assignment of error to a portion of the charge to the jury by the trial court, that the Circuit Court of Appeals in this case found such general charge correct but predicated reversible error therein because this general charge was not modified or explained, when as a fact there was no request for such modification or change.

But we insist that the charge of the Court to the jury should have been considered as a whole and that isolated portions of the charge can not be taken for the purpose of criticisms and reversal, where the matter criticized is fully covered in other portions of the Court's charge to the jury.

In this case, at page 265 of the record (and we refer to the record as appearing in the Circuit Court of Appeals) it appears that the jury having retired to consider its verdict returned unto the Court and asked for further in-

structions as to what would constitute contributory negligence and thereupon the trial court charged them as follows:

> "Well, I don't suppose that there is any objection by either side to further elucidate the question of law. Contributory negligence, gentlemen, such as will defeat recovery, means conduct on the part of the plaintiff **that contributes approximately to the injury.** In other words, if notwithstanding the negligence of the defendant, the plaintiff does something himself **which reasonably contributes to the injury, approximately,** then that is what is known as 'contributory negligence.'" (Our italics throughout.)

Here the Court distinctly told the jury that the negligence of the plaintiff which would defeat recovery **must contribute approximately to the injury,** and this instruction so given by the Court fully covers the objection which the Court of Appeals found to the isolated portion of the charge referred to in its opinion.

Again, at page 266, the Court had fully explained that the negligence of the plaintiff must be the proximate cause of the injury, for he there stated to the jury:

> "Or in any case, where the act of the plaintiff **enters into approximately** the circumstances which bring about the injury, then it is contributory negligence."

At page 251 of the record, the Court further told the jury:

> "However, you are instructed that the plaintiff would not be guilty of contributory negligence approximately causing the injury by merely encouraging the said Merchant to operate the said car."

The Court having sufficiently instructed the jury on the question of proximate cause, error cannot be predicated on his failure in the isolated paragraph referred to by the Court of Appeals in not continuing a similar instruction.

In 14 R. C. L. Sec. 72, page 812, the law, as supported by numerous authorities, is stated as follows:

> "The rule is quite generally accepted that the omission from a charge of certain elements will not require a reversal where such deficiency is fully supplied in other instructions. In applying this rule it has been held that an instruction that is likely to mislead the jury may be cured by others covering the same point in a clear and concise manner; that an instruction which taken by itself is ambiguous, and in one view erroneous, will be cured by another qualifying it, if it is apparent that the jury would not have been misled thereby."

If there was a deficiency in the instruction as quoted

by the court in the part of the charge assigned as error, then such deficiency is fully supplied by the other instructions which we have quoted in this brief.

In the same work, at Sec. 76, page 818, the following is stated as the law and is likewise sustained by numerous authorities:

> "Instructions must be taken as an entirety, that is, each must be considered in connection with others of the series referring to the same subject, and connected therewith, and if, when taken together, they properly express the law as applicable to the particular case, no just ground of complaint exists, even though an isolated and detached clause is, in itself, inaccurate or incomplete, and although some of them taken separately may be subject to criticism."

The Court had fully instructed the jury on the subject under investigation and the charge objected to, when taken in connection with the other portions of the charge to which we have called attention, is subject to no just criticism.

In the same work, at page 820, the law, sustained by numerous authorities, is further stated:

> "And, as it is generally impossible to state all of the case in one instruction, a cause will not be re-

> versed on appeal though the whole of the law upon a particular head is not fully stated in one or more of the separate parts of the charge to the jury, if the instructions to them, taken as a whole, correctly state the law. Therefore, though each instruction fails to carry qualifications which are explained in others, there is no error."

The only objection to the charge here under investigation interposed by the Court of Appeals and not by any exception on the part of the plaintiff, is that the particular portion of the charge quoted in the opinion of the court does not fully state the law applicable to the question, but the instructions taken as a whole correctly state the law and correctly instruct the jury that the negligence of the plaintiff in order to defeat recovery must have been the proximate cause of the injury, and while this isolated portion of the charge failed to carry this qualification, it was fully explained in other portions of the charge and, therefore, there was no error.

In Zoline's Federal Appellate Jurisdiction and Procedure, at Sec. 147, page 93, that learned author says:

> "Each portion of the charge to the jury must be considered in its relation to the entire charge."

Considering the portion of the charge here under investigation in its relation to the entire charge of the

Judge to the jury, any ambiguities or omissions therein are fully explained and fully covered in the general charge of the court.

In the case of Chicago Great Western Railway Co. vs. McDonough 161 Fed. 657, the Circuit Court of Appeals had under consideration this question and in passing on the matter said:

> "In examining the charge, for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single or detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts."

> "A general exception to a considerable portion of the charge cannot be regarded as presenting a specific objection to a lesser portion, which in fairness to the trial court should have been specially called to its attention, in order that the appropriate correction might be made."

In this case the court, through Mr. Justice Van Devanter, now a member of this court, at page 660, said with reference to the charge of the Judge to the jury:

> "But some portions of it, if separated from the rest, would be justly regarded as objectional. That, however, is not a fair test of their meaning,

for as was said in Magniac vs. Thompson 7 Pet. 348, 390, 8 L Ed. 709, and Spring Co. vs. Edgar, 99 U. S. 645, 659, 25 L. Ed. 487:

"In examining the charge, for the purpose of ascertaining its correctness in point of law, **the whole scope and bearing of it must be taken together.** It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language **of other parts of the charge.** In short, we are to construe the whole as it must have been understood, both by the court and the jury, at the time when it was delivered.

"A reading of the entire charge makes it plain that the faults in the portions covered by these assignments were inadvertent, rather than intentional, and were so fully corrected by the effect of the charge as a whole that the jury could not have been misled or confused by them. They, therefore, afford no ground for complaint. Railroad Co. vs. Gladmon, 15 Wall, 401, 409, 21 L. Ed. 114; Evanston vs. Gunn, 99 U. S. 660, 668, 25 L. Ed. 306; Baltimore & Potomac R. R. Co. vs. Mackey, 157 U. S. 72, 86, 15 Sup. Ct. 491, 39 L. Ed. 624." See also Bennet vs. U. S. 227 U. S. 333; Agnew vs. U. S. 165 U. S. 36."

In the case of St. Louis & S. F. Ry. Company vs. Jeffries, 276 Fed. 76, the court at page 78 said:

> "We do not deem it necessary to cite authorities in support of the proposition that counsel may not select particular portions from the charge for the purpose of assigning error, but the whole charge must be taken together, and it if appears that the case is fully and fairly stated, the mere fact that certain passages standing alone would be subject to criticism is not important."

While the passage here quoted by the Court of Appeals, if standing alone and if excepted to, might be subject to criticism, yet taken in connection with the charge as given by the court to the jury in its general charge, indeed in what the court told the jury at the same time that it gave the charge that is objected to, the question is fully covered and **the jury was fully instructed that the negligence of the plaintiff in order to defeat recovery, must have been the proximate cause of his injury and not the remote cause.**

A case particularly applicable to the point here under consideration is presented in Gila Valley, etc., Co. vs. Lyon 203 U. S. 465; 51 L. Ed. 276. In that case the court had charged the jury that unless an accident to a railway brakeman was caused solely by the negligence of the conductor, the defendant railway company was liable. It was held that even if erroneous in that "sole cause" is not synonymous with "proximate cause," the defendant was not preju-

diced where further instructions given at its request were to the effect that if the conductor's negligence was the proximate cause of the accident, there could be no recovery, and the Supreme Court, in passing on the matter, said that the defendant received no prejudice from the charge as given, and said:

> "If the defendant had desired to obtain a more specific charge in relation to the distinction between 'sole' and 'proximate' cause of the accident, as applied to the negligence of the conductor, the court should have had its attention specifically drawn to the objection to the word 'sole,' and the particular freedom from liability asserted if the negligence of the conductor were the proximate cause of the accident, as distinguished from the sole cause. A general exception to the charge as given would not raise the question. Congress & E. Spring Co. vs. Edgar 99 U. S. 659, 25 La. Ed. 487, 491. The requests to charge as given shows the jury had its attention drawn to the proximate cause, and that if the conductor's negligence were the proximate cause the plaintiff could not recover."

Here, the Judge did charge the jury that the negligence of the plaintiff must have been the proximate cause of the injury, particularly at pages 265 and 266 of the record from which we have quoted.

If the respondent desired to obtain a more specific charge

in relation to the distinction between the sole and proximate cause of the accident, the lower court should have had its attention specifically drawn to the objection, which was not done in this case.

The respondent, having assigned as error only a portion of the charge in his sixteenth assignment, the Circuit Court of Appeals found that this charge was in part justified. It found that the respondent was guilty of contributory negligence because at pages 3 and 4 of its opinion it discusses the questions at length and cites authorities holding that a passenger may be guilty of contributory negligence and held that a part of the charge which related to his contributory negligence was correct.

Having held with petitioner at page 5 of its opinion, the Court found for the respondent on an issue not raised in any exception taken to the charge of the Court, or any contention made in the trial of the case in the lower Court or in the brief of counsel.

The Circuit Court of Appeals first stated:

> "Under the above set out instructions to the jury the plaintiff could not recover if he voluntarily remained on the car after he saw that it was being negligently run, and a person of ordinary care, situated as he was, would have realized that it was dangerous to remain on the car."

Having approved this instruction in its entirety and having found that the instruction was correctly given, and stating the law, at page 5 of its opinion, the Court said:

> "Though the plaintiff was negligent in the respect stated, if, as evidence adduced indicated, the defendant's employee was aware of such negligence in time to have avoided the injury by the use of reasonable care, and he failed to use such care, that failure might be found to be the sole proximate cause of the injury and plaintiff's negligence be deemed a remote cause." (Authorities.)
>
> "The plaintiff's right to recover was not barred if his negligence was only a remote cause of his injury, and Merchant's negligence was the sole proximate cause of it. The instruction in question was erroneous."

Let it not be forgotten that the Court had already approved the instruction in every particular.

The contention which we have last quoted was not embraced in the charge of the lower court and no such modification, change or alteration of the charge given was requested on behalf of the respondent.

Of course, it will be conceded that his right to recover was not barred if his negligence was only a remote cause of his injury and Merchant's negligence was the sole proximate cause of it. But no such issue was presented to the

jury who tried the case and no requested instruction to that effect was made on behalf of the respondent in the trial court, nor was any such contention made by him in his argument in the Circuit Court of Appeals.

If the charge as given by the Court was correct in the main, and needed a modification or change, it was clearly the duty of the respondent to indicate to the trial Court the change or modification desired, and he cannot on appeal, under an exception to the whole charge, have the Court interpose an exception for him, which he himself did not make.

From these authorities it is submitted that the decision of the Circuit Court of Appeals in this case is in conflict with and contrary to numerous decisions of this Honorable Court and in conflict with the decisions of all of the other Circuit Courts of Appeal and for that reason the writ of certiorari should issue in order that the jurisprudence in the Federal Courts on these questions may be uniform.

The case in question is one of great importance to railroads, and in addition to that the decision of the Circuit Court of Appeals being in conflict with the decisions of other Circuit Courts of Appeal and in conflict with the decisions of this court, in order to secure uniformity of de-

cisions the writ applied for should be granted.

In the case of American Construction Co. vs. Jacksonville, Tampa & Key West Ry. Co., 148 U. S. 372, this court in speaking of the power to grant such writs and when they should be granted, said:

> "The jurisdiction of this court to require, by certiorari or otherwise, a case to be certified from the Circuit Court of Appeals, to this court for its review and determination, should be exercised only in cases of gravity and importance, **or in order to secure uniformity of decision.**"

The same doctrine was announced in the case of Warner vs. New Orleans, 167 U. S. 467, 42 Law Ed. 239.

Inasmuch as the case here is one of great importance and inasmuch as the decision of the Circuit Court of Appeals is in direct conflict with the numerous decisions of this court, it is submitted that the writ should be granted.

Respectfully submitted,

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.....

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PETITIONER'S BRIEF

Office Supreme Court, U. S.
FILED
MAR 18 1927
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

R. E. ELLZEY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

STATEMENT AND BRIEF OF PETITIONER.

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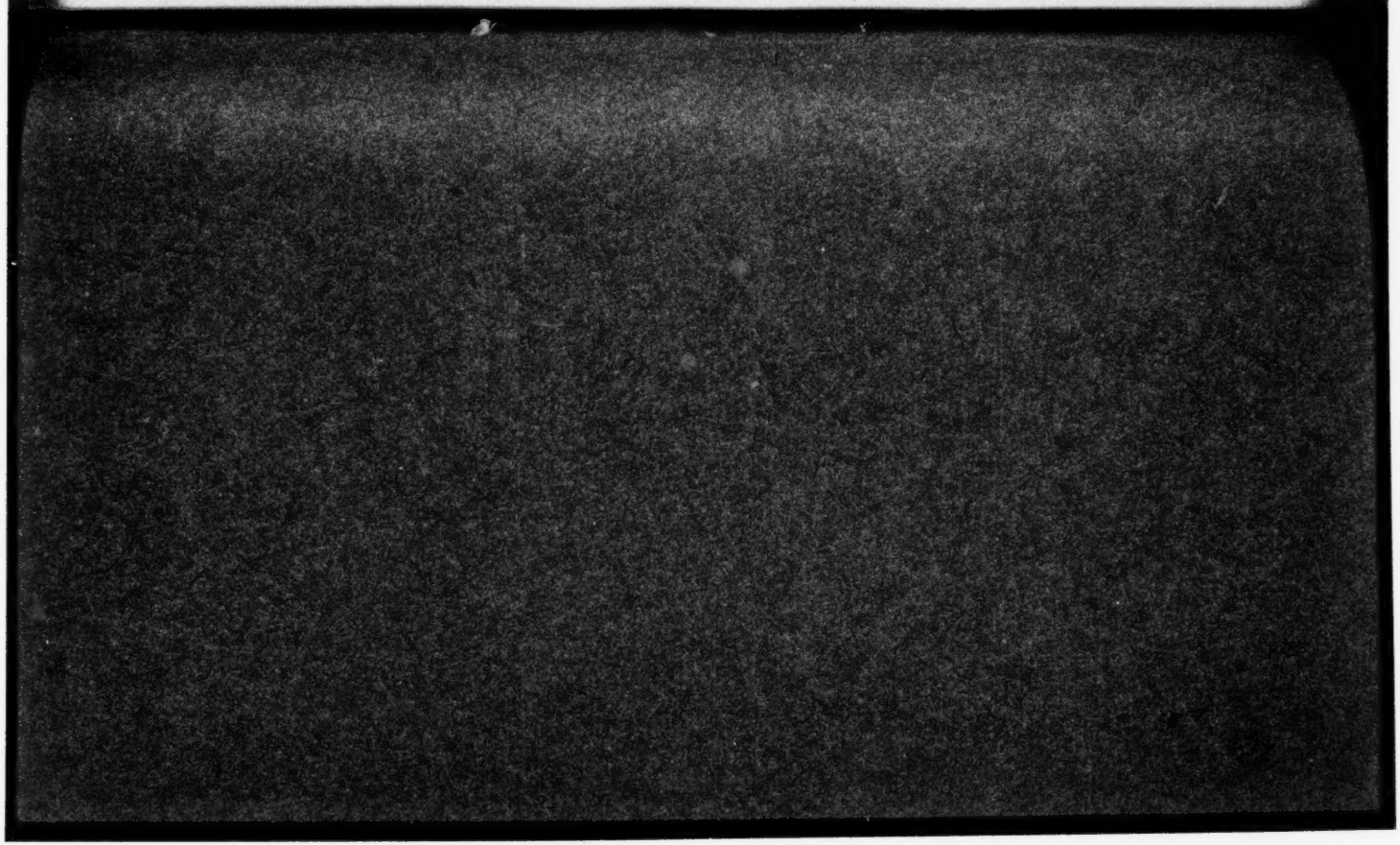

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R. E. ELLZEY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

STATEMENT AND BRIEF OF PETITIONER.

The petitioner seeks to review the action of the Court of Appeals for the Fifth Circuit (*Ellzey* v. *Kansas City Southern Ry. Co.*, 12 Fed. (2d) 4), in reversing a judgment in favor of your petitioner. The case is here by order of this court of July 7, 1926 (R. 244) granting petitioner's application for a writ of certiorari to said court of appeals.

The action is one for personal injuries received by the respondent, R. E. Ellzey (hereinafter for convenience sometimes called the "plaintiff"), a citizen of Louisiana, in the derailment of a motor car of the petitioner, The Kansas City Southern Railway Company (hereinafter for convenience sometimes called the "defendant"), a Missouri corporation,

on defendant's railway, near Rosepine, Louisiana (north of DeQuincy, Louisiana), on to-wit: August 10, 1922. At the time of his injury plaintiff was acting as a United States Deputy Marshal, and was engaged, as such, in protecting employes of the defendant during the general strike of railway shopmen in the summer of 1922 (R. 24, 25). While so engaged he was assigned to guard T. M. Merchant, a telegraph lineman employed by the defendant, Merchant being then ordered to locate and repair trouble on the telegraph line of defendant south of Leesville and north of DeQuincy, in Louisiana (R. 33). They went south to DeQuincy (R. 34, 35), where they procured the motor car in question (R. 36, 37), and then proceeded north on the line of the defendant and located the trouble at Singer, a point south of DeRidder, Louisiana (R. 38). After the telegraph line repairs had been completed Merchant and plaintiff proceeded north on the motor car (R. 39), and, after passing DeRidder (R. 40), the motor car left the track near Rosepine, Louisiana (R. 40), and plaintiff was injured (R. 41). This action was instituted in the District Court of the United States for the Western District of Louisiana to recover damages for those injuries, the amount claimed being $60,000.00 (R. 7). One of the grounds of liability charged by the plaintiff was that the derailment was caused by Merchant's negligence in operating the motor car at a dangerously high rate of speed (R. 5, 9). One of the grounds of defense alleged by defendant was that plaintiff proximately contributed to his own injury in that he assumed the control and direction of the motor car and induced or acquiesced in the operation of the car at an excessive and dangerous rate of speed (R. 17), and there was evidence supporting this defense (R. 148, 149, 135). The district court instructed the jury on the issues of negligence and contributory negligence, and in its charge on the issue of contribu-

tory negligence told the jury, amongst other things, that if the plaintiff caused the car to be run at a reckless and high rate of speed, or if he saw it was being negligently run, and knew that it was dangerous to continue to so operate it, and made no protest, or effort to protect himself, then his contributory negligence would be a bar to his right to recover. A judgment was returned in favor of the defendant, and plaintiff took the case by writ of error to the Court of Appeals for the Fifth Circuit, where the judgment was reversed and the cause remanded, on the ground that the portion of the charge above referred to was erroneous, the ruling of the Court of Appeals being that even if Merchant and plaintiff might both have been negligent as to the rate of speed at which the motor car was run the negligence of Merchant might have been the proximate cause and plaintiff's the remote cause, in which event the plaintiff's negligence would not bar his right to recover. The defendant contends that this ruling was erroneous, because the jury was fairly and correctly instructed on the issue of whether or not plaintiff was guilty of contributory negligence, and whether or not such negligence was a proximate cause of his injury, and because no objection or exception presenting the question on which the decision of the Court of Appeals was based was made or saved by the plaintiff. That portion of the charge of the District Court which was condemned by the Court of Appeals, and other portions of the charge bearing on the issue of plaintiff's contributory negligence, and whether it was a proximate cause of his injuries, and the actions of plaintiff and of the court in reference to such portions of the charge, are set forth in detail in the following brief, in the discussion of the questions involved in this proceeding. The case has been brought to this Court by certiorari on the petition of the defendant, and the defendant, your petitioner, respectfully states that the judgment and decision of the Court of Appeals are erroneous and in conflict with the decisions of this Court, and with decisions of other United States Circuit Courts of Appeals, in the particulars set forth in the following assignment of errors:

ASSIGNMENT OF ERRORS.

1. The Court of Appeals erred in holding that the following portion of the District Court's charge to the jury was erroneous:

> "If you should find that in this case the plaintiff, urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery; or if he saw that the car was being negligently run in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law, constitute contributory negligence" (R. 205, 206).

2. The charge by the District Court to the jury, considered as a whole, correctly and fairly stated the law on the issues made by the pleadings and the evidence, and the Court of Appeals erred in considering only a detached passage of the charge, and in refusing to consider such charge as a whole, and in holding to be erroneous that portion thereof set forth in the first assignment of error.

3. The plaintiff made no definite objection, and saved no lawful exception to the action of the District Court in giving that part of the District Court's instruction condemned by the Court of Appeals, and the Court of Appeals erred in not holding that the plaintiff had waived his right, if any he had, to object to said charge.

BRIEF OF THE ARGUMENT.

I.

The District Court's charge to the jury, considered as a whole, correctly and fairly stated the law on the issues made by the pleadings and the evidence, and the Court of Appeals was not justified in holding that such charge was erroneous.

After the District Court had fairly and correctly instructed the jury on the issues made by the pleadings and the evidence, including the issue of plaintiff's contributory negligence, the jury retired to consider of their verdict, and thereafter returned into open court with a request for further instruction as to what would constitute contributory negligence on the part of the plaintiff. Thereupon the following proceedings were had (R. 203-206):

> The Court: Well, I don't suppose that there is any objection by either side to further elucidating the question of law. Contributory negligence, gentlemen, such as will defeat recovery means conduct on the part of the plaintiff that contributes approximately to the injury. In other words, if, notwithstanding the negligence of the defendant, the plaintiff does something himself which reasonably contributes to the injury, approximately, then that is what is known as "contributory negligence." For instance, if a man—a railroad train was being operated without a proper lookout at a crossing, and a person with no regard for his own safety, carelessly walked upon the track in the face of an approaching train, and was struck, that would be, in law, contributory negligence; or in any case where the act of the plaintiff enters into approximately the circumstances which bring about the injury, then it is contributory negligence. In other words, if in this case, you find that there was negligence on the part of the defendant in failing to provide a safe conveyance, failing to operate the conveyance upon which the plaintiff was traveling, in a safe manner, through

its agents, who, though found from the evidence, were acting within the scope of the employment but notwithstanding such negligence, the plaintiff himself participated in counseling, directing or encouraging in such negligence or careless act on the part of those who were so engaged, then you would have in law that which would amount to contributory negligence, and which would bar recovery. The burden of proving contributory negligence rests upon the defendant. It is a special defense specially pleaded, and must be supported by the evidence, by a fair preponderance, just as the plaintiff must support the charges of negligence on the part of the defendant by a fair preponderance of evidence.

I believe that substantially covers the point upon which you desire instructions. * * *

Mr. Jones: With reference to the instruction on contributory negligence, we call attention to the fact that conduct upon the part of the plaintiff that would operate as contributory negligence in law, approximately causing the injury, would have to be negligent conduct—that is, such conduct as a man of ordinary care and prudence could not have been guilty of under the same or similar circumstances, having the opportunity and information, etc., the plaintiff had at the time. The idea being this: that if the plaintiff was a passenger, as we think he was, on the car, that conduct upon his part, to constitute contributory negligence must have been such that he knew endangered his safety; and to that extent we except to the new definition of contributory negligence, and request that Your Honor elucidate that a little more clearly. Just the mere fact that he might have done something that brought about the injury would not be sufficient.

The Court: To state the matter a little more clearly, gentlemen, in order to constitute contributory negligence, the plaintiff must have done something actively, or omitted to have done something passively, which to a reasonable man placed in his situation would have appeared to be such as would have brought about his injury. In other words, it must be such an act as a reasonable man acting in the circumstances in which he was situated, must reasonably have known that it would contribute to the accident; that he could reasonably have expected such a result to flow from the course which he had pursued, or he must have omitted to do something

which a reasonable man, under the same circumstances, could have done in order to avoid the injury. In other words, coming more particularly to the case in hand; *if you should find that in this case the plaintiff urged directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery; or if he saw that the car was being negligently run in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law, constitute contributory negligence.* I think that covers it.

Mr. Jones: There is no plea of an omission to check the speed of the car, if Your Honor please.

Mr. Lewis: There is, Your Honor.

Mr. Jones: Is there?

Mr. Lewis: It is definitely set forth in the answer.

The Court: I think it is covered by the pleadings. Gentlemen, that is about as definite as I think I can make it.

Mr. Jones: I really think you caught my view about it, but we will reserve an exception. The court has reasonably covered plaintiff's position, except this—

Mr. Lewis: Your Honor, if counsel is going to make an extended argument, I don't think it is proper at this time.

The Court: Gentlemen, I have covered the point sufficiently, and whatever right may be sought in the matter can be protected by the proper bill.

Mr. Jones: Yes, I am going to except to that portion of the charge.

The Court: The plaintiff excepts to the instruction. All right, gentlemen, you may retire.

(The jury then again retired to consider of its verdict.) (R. 203-206.)